IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.1225 OF 2004

Nariman Point Association & Anr. ...Petitioners.
Vs.
Union of India & Ors. ...Respondents.

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Mr. Harilal Thakkar, Senior Advocate with Mr. D.R. Poddar i/b. M/s.Poddar & Co. for the Petitioners.
Mr. Y. R. Mishra with Mr. Suresh Kumar for Respondent No.1.
Mr. P.G. Lad, AGP for Respondent No.2.
Mr. R.M. Sawant for Respondent No.3.
Mr. R.A. Dada, Senior Advocate and Mr. Fedrun Devitre, Senior Advocate with Mr. Shyam Mehta i/b. Federal & Rashmikant for Respondent No.5.

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CORAM : DALVEER BHANDARI, C.J. &
DR.D.Y.CHANDRACHUD, J.

October 6, 2005.

JUDGMENT (PER DR. D.Y. CHANDRACHUD, J.):

The Petitioners in these proceedings under Article 226 of the Constitution had instituted before this Court, a Writ Petition in December 2001 in the public interest to challenge the sanction granted for a project which involved the construction of a multi-storeyed car parking facility together with a commercial complex at Nariman Point, Mumbai. The earlier petition filed by the

Petitioners was disposed of by a judgment and order of a Division Bench of this Court consisting of the Hon'ble the Chief Justice, Mr.Justice C.K. Thakker (as His Lordship then was) and one of us (D. Y. Chandrachud, J.). The aforesaid decision in **Nariman Point Association vs. State of Maharashtra** was delivered on 14th February 2003 and is reported in 2003(5) Bom. C. R. 273. This Court came to the conclusion that there was no merit in the challenge to the project raised before the Court. This Court held that the dominant purpose of the reservation of the land for a multi storeyed car parking facility had been fulfilled upon the utilisation of the entire permissible F. S. I. for the aforesaid purpose. The Court held that once this had been done, the permission which was granted for setting up a commercial complex as a part of the overall project was consistent with Development Control Regulation 9(IV)(i). In the judgment that was delivered by the Court, all the challenges were dealt with on merits. The Court, however, also noted that there was a gross and unexplained delay on the part of the Petitioners. The Petitioners had themselves submitted a proposal in 1989 for the construction of a multi storeyed car parking facility and that proposal envisaged the utilisation of commercial space as a part of the overall development

of the plot of land in question, for multi storeyed car parking. This Court held that the Petitioners were aware since June 1998 that the Fifth Respondent herein, was to put up a multi storeyed car parking facility and the Petitioners had taken inspection of documents in May 2001 from MMRDA. The Petition was filed before the Court in December 2001 at which point of time, a substantial part of construction work had been carried out. In the circumstances, dealing with the issue of delay, this Court held as follows :

> "In a matter such as the present, the Court would be slow to interfere with the construction and with the implementation of the project when there has been a significant delay on the part of the Petitioners in moving the Court. The question of latches is one to be addressed in the facts of each case, where the issue arises. In the present case, there has been a significant delay on the part of the Petitioners even after they obtained knowledge of the project and thereafter, since the date on which inspection of documents was taken. Moreover, as already noted earlier, the Petitioners had themselves submitted a proposal in 1989 for the construction of a multi storeyed car parking facility and that proposal also envisaged utilisation of commercial space as a part of the overall development of the plots of land in question for multi storeyed car parking."

2. On behalf of the Fifth Respondent, it has been stated

before the Court that the construction which began in October 2001 has since been completed at a cost of over Rs.85 Crores. The multi storeyed car parking is stated to be operational with a capacity for the parking of 500 cars. The Commercial Complex is stated to have been launched on 12th November 2004. It has been stated that of a total area admeasuring 23,572 sq.mtrs., an area admeasuring 17,170 sq.mtrs. has been utilised for a multi storeyed car park and 6402 sq.mtrs. for a commercial centre. This petition was instituted on 29th April 2004, nearly one year after the judgment in the earlier proceedings.

3. In these proceedings, it has been submitted that the State Government had issued a letter of sanction on 26th June 2002 for the development of the plot and since the plot falls in the CRZ-II category, development was permitted in accordance with the Development Control Regulations prevailing on 19th February 1991. It has now been submitted that there is a breach of the CRZ notification dated 19th February 1991 issued by the Ministry of Environment and Forests, the Development Control Regulations in force on 19th February 1991 and the letter of sanction dated 26th June 2002. In the submissions which have been filed in these

proceedings, it has been urged that the issue in the earlier petition was as to whether, in the absence of an amendment to the Development Plan earmarking plots 240 and 240A for multi storeyed car parking, the said plot could be allowed to be utilised for commercial purposes. It has been submitted that the issue which is urged before the Court in these proceedings, was not raised in the earlier proceedings.

4. Now it is an admitted position that the letter of sanction of the Government of Maharashtra dated 26th June 2002 was disclosed during the proceedings in the earlier petition. There is merit in the submission urged on behalf of the Fifth Respondent that all contentions in regard to the violation of the terms and conditions of the letter dated 25th June 2002 could have been and ought to have been raised in the challenges that were preferred in the earlier proceedings. The Petitioners here, it must be noted, were also the Petitioners in the earlier proceedings. In **Forward Construction Co. v. Prabhat Mandal,** (1986) 1 SCC 100, the Supreme Court held that the principles of constructive *res judicata* are applicable to public interest litigation, particularly in view of Explanation VI to Section 11 of the Code of Civil Procedure, 1908:

> "But it is only when the conditions of Explanation VI are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of providing the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision. The words "public right" have been added in Explanation VI in view of the new Section 91 CPC and to prevent multiplicity of litigation in respect of public right. In view of Explanation VI it cannot be disputed that Section 11 applies to public interest litigation not by way of a private grievance. It has to be a bona fide litigation in respect of a right which is common and is agitated in common with others."

This decision has been considered in a subsequent judgment of a Bench of two Learned Judges of the Supreme Court in **V. Purushotham Rao v. Union of India,** (2001) 10 SCC 305, where the Supreme Court held thus:

> "In our considered opinion, therefore, the principle of constructive res judicata cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and the larger public interest which is being served. There cannot be any dispute that in competing rights between the public interest and individual interest, the public interest would override."

Consequently, the question as to whether the principle of

constructive *res judicata* will apply in the facts of a particular litigation instituted in the public interest will depend *inter alia* on the nature of the litigation, its impact on the society and the public interest involved. In a recent judgment in **R. & M. Trust vs. Koramangala Residents Vigilance Group,** (2005) 3 SCC 91, the Supreme Court emphasised that the jurisdiction which the Court exercises in public interest is a "sacrosanct jurisdiction" and "should be invoked very sparingly and in favour of vigilant litigant and not for the persons who invoke this jurisdiction for the sake of publicity or for the purpose of serving their private ends". The Supreme Court sounded a note of caution in regard to the exercise of this jurisdiction, noting that it has become common for unscrupulous litigants to serve their private ends. The Supreme Court held thus:

> "This has become very handy to the developers and in matters of public contracts. In order to serve their professional rivalry they utilise the service of the innocent people or organisation in filing public interest litigation. The Courts are sometimes persuaded to issue certain directions without understanding the implications and giving a handle in the hands of the authorities to misuse it. Therefore, the Courts should not exercise this jurisdiction lightly but should exercise in very rare and few cases involving public interest of a large number of people who cannot afford litigation and are made to

suffer at the hands of the authorities."

The Court held that delay is "a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution" and the Court would not be inclined to disturb third party interests which may have been occasioned in the meantime. In that case, the construction had already started in 1987 and the building had been constructed upto the third floor. The construction was stopped in 1988 and resumed in March 1991. The petition was filed in November 1991 by which time, the construction was almost complete. The Supreme Court held that the delay was fatal and that the Single Judge of the High Court correctly held it to be so.

5. In the present case, the project has been completed. The multi-level car park as well as the commercial complex have become operational. There was delay on the part of the Petitioners herein, even in moving the earlier writ proceedings which was taken note of in the judgment of this Court. Even so, the challenges to the project were dealt with and disposed of also on merits. The letter of sanction dated 26th June 2002 of which a

breach is now complained against, was disclosed in the earlier proceedings and the Petitioners were aware of the conditions governing the sanction. If the Petitioners were aggrieved on the ground that there was a breach of the conditions of sanction, that ground ought to have been raised in the earlier proceedings, but was not raised. It is not open to a litigant to selectively address grounds of challenge, at his choice, in successive petitions questioning the same project. That would be a complete abuse of process. The principle of repose requires that a litigant address and deal with all such challenges in one and the same petition. Even after the earlier judgment, the present proceedings were instituted well over a year thereafter by the same Petitioners. We are of the view that in these circumstances, the Petitioners are disentitled both on the principles of constructive *res judicata* and on the ground of the unexplained delay on their part, to any relief in these proceedings. We, therefore, do not find any reason to interfere. The Petition shall stand dismissed.

CHIEF JUSTICE

DR.D. Y. CHANDRACHUD, J.